ORIGINAL

LAW OFFICES
LEVENTHAL, SENTER & LERMAN P.L.L.C.
SUITE 600
2000 K STREET, N.W.
WASHINGTON, D.C. 20006-1809

TELEPHONE
(202) 429-8970

TELECOPIER
(202) 293-7783

WWW.LSL-LAW.COM

DOCKET FILE COPY ORIGINAL

February 10, 2000

WRITER'S DIRECT DIAL
202-416-1081

WRITER'S E-MAIL
JMADRID@LSL-LAW.COM

VIA HAND DELIVERY

Magalie Roman Salas, Secretary
Federal Communications Commission
445 Twelfth Street, S.W., Room TW-B204
Washington, DC 20554

Re: Establishment of a Class A Television Service (MM Docket No. 00-10)

Dear Ms. Salas:

Transmitted herewith on behalf of Grupo Televisa, S.A., a Mexican corporation, are an original and thirteen (13) copies of its Comments on the Commission's Notice of Proposed Rule Making in the above-referenced proceeding.

In connection with its representation of Grupo Televisa, S.A., Leventhal, Senter & Lerman P.L.L.C. has registered as a foreign agent under the Foreign Agents Registration Act.

Respectfully submitted,

Juan F. Madrid

Enclosure

134468/021000/04:49

0413

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	MM Docket No. 00-10
Establishment of a Class A Television Service	)	
	)	

To: The Commission

COMMENTS OF GRUPO TELEVISA, S.A.

Grupo Televisa, S.A. ("Televisa"), by its attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's rules,[1] hereby comments on the Commission's *Order and Notice of Proposed Rule Making* ("*NPRM*") in the above-captioned proceeding,[2] in which the Commission seeks to establish regulations for a new primary Class A license for qualified low-power television ("LPTV") stations,[3] as required by the *Community Broadcasters Protection Act of 1999* ("CBPA").[4] Televisa, a Mexican corporation, is participating in this proceeding to bring to the Commission's attention the fact that, in establishing regulations for a class of primary LPTV stations, the Commission must be mindful of its obligations under bilateral U.S.-Mexican

---

1 47 C.F.R. §§ 1.415, 1.419.

2 *Establishment of a Class A Television Service*, FCC 00-16 (MM Docket No. 00-10) (released January 13, 2000).

3 *See id.*, FCC 00-16, at 1.

4 *Community Broadcasters Protection Act of 1999*, Section 5008 of Pub L. No. 106-113, 113 Stat. 1501 (1999), Appendix I, *codified at* 47 U.S.C. § 336(f).

agreements which dictate the ***secondary*** status of LPTV stations close to the U.S.-Mexican common border.

STATEMENT OF INTEREST

Televisa, a major Mexican television broadcaster, owns, or is affiliated with, a number of television stations along the U.S.-Mexico border. These stations operate in the analog mode on both VHF and UHF frequencies, and are expected to provide digital television service in the future. The adoption of the new Class A television designation for certain LPTV stations without adopting appropriate protections for full-service television stations close to the border could jeopardize the operation of Mexican TV stations in the border area, including those owned or affiliated with Televisa, and affect the U.S. public that relies on certain of these stations for broadcasting service.

INTRODUCTION AND SUMMARY

On November 29, 1999, Congress enacted the CBPA, under which the Commission is required to establish regulations concerning a new primary class for qualified LPTV stations. This step is designed to provide enhanced protection of the service areas of LPTV stations.

While the CBPA creates several specific exceptions to the LPTV service preservation requirement which are intended to protect *U.S.* analog and DTV full-service television stations in certain circumstances,[5] neither the CBPA nor the *NPRM* addresses the need to provide safeguards to protect *Mexican* TV stations that may be affected by the newly designated or licensed Class A LPTV stations. These omissions are of concern to Televisa because LPTV signals typically extend to a range of approximately 12 to 20 miles, and

---

[5] *See* CBPA, 47 U.S.C. § 336(f)(7).

consequently Class A U.S. LPTV stations operating within this range near the border could interfere with Mexican stations operating nearby.

Under the VHF TV Agreement[6] and UHF TV Agreement[7] between Mexico and the United States, as well as their 1988 modifications[8] (collectively, the "VHF and UHF Agreements"), Mexican TV stations must be protected along the border, and LPTV stations in both countries must operate on a secondary basis with respect to full service stations operating on the channels that are identified in these agreements.[9] The agreements also provide that either country may make LPTV assignments without notifying the other country *provided* that such assignments comply with certain power and distance-to-border parameters.[10] Any LPTV assignments inconsistent with the required parameters must be notified and fully coordinated with the other country.[11]

Additionally, under the U.S.-Mexican DTV Agreement,[12] which provides the basis for the introduction of television using digital technology along the Mexican-U.S. border, the

---

6 United States-Mexico VHF Television Agreement (April 18, 1962) (the "VHF TV Agreement").

7 Agreement Amending the Agreement Relating to Assignment and Usage of Television Broadcasting in the Frequency Range 470-806 MHz (Channels 14-69) Along the United States-Mexico Border (June 18, 1982) (the "UHF TV Agreement").

8 United States-Mexico Low Power VHF Television Agreement (September 14, 1988) ("VHF TV Agreement Modification"); Agreement Amending the Agreement Relating to Assignments and Usage of Television Broadcasting Channels in the Frequency Range of 470-806 MHz (Channels 14-69) Along the United States-Mexico Border (November 21, 1988) ("UHF TV Agreement Modification").

9 *See* VHF TV Agreement Modification para. M bis; UHF TV Agreement Modification para. 1.I.2.

10 *See id.*

11 *See id.*

12 Memorandum of Understanding Between the Federal Communications Commission of the United States of America and the Secretaria de Comunicaciones y Transportes of the United Mexican States Related to the Use of the 54-72 MHz, 76-88 MHz, 174-216 MHz and 470-806 MHz Bands for the Digital Television Broadcasting Service Along the Common Border (July 22, 1998) (the "DTV Agreement").

Secretaria de Comunicaciones y Transportes of the United Mexican States ("SCT") and the FCC are to coordinate DTV allotments not conforming to the mutually accepted allotments identified in the DTV Agreement.[13] In this regard, any action by the Commission that may alter the premises upon which DTV is to be introduced in the U.S. and Mexico, such as permitting an LPTV operator in the U.S.-Mexico border area to provide digital service[14] on a channel that is not part of the agreement, must be coordinated pursuant to the DTV Agreement.

Thus, while the CBPA does not address the need to protect Mexican stations vis-à-vis any U.S. LPTV station located near the U.S.-Mexican border that may be eligible for Class A or primary status, the VHF and UHF Agreements were specifically amended in 1988 to protect TV broadcasting stations from interference caused by LPTV stations ***by retaining such stations' secondary status***. Likewise, the 1998 DTV Agreement was executed to protect mutually agreed DTV allotments along the border from unwanted interference.

Televisa first notes in these comments that the intergovernmental VHF and UHF Agreements and DTV Agreement (collectively, the "U.S.-Mexico TV Agreements" or "Agreements") are valid and enforceable, and may not be altered without negotiations conducted by the proper governmental authorities. Additionally, under the Commission's own rules, in granting any license, the FCC is required to comply with the treaties and international agreements between the U.S. and Mexico.[15] Accordingly, despite the omission of such considerations from the CBPA itself, any new Class A LPTV station designation or license adopted by the

---

[13] *See* DTV Agreement para. 4.

[14] *See* CBPA, 47 U.S.C. § 336(f)(4).

[15] *See* 47 C.F.R. § 73.1650(a).

Commission in this proceeding must preserve the service area of Mexican TV stations as specified in the U.S.-Mexico TV Agreements.

DISCUSSION

A. The U.S.-Mexico TV Agreements Are Valid And Enforceable Under United States Law

Because the VHF and UHF Agreements and DTV Agreement are "sole executive agreements," a form of international agreement entered into pursuant to the constitutional authority of the President,[16] the Commission, in establishing regulations for Class A LPTV stations, must act consistently with the provisions of these U.S.-Mexico TV Agreements. The VHF and UHF Agreements, as well as their 1988 modifications, were signed by the then-United States ambassadors to Mexico, and the DTV Agreement by the FCC Chairman and the Communications Subsecretary of Mexico. As the ambassadors who executed the VHF and UHF Agreements, and the government officials who executed the DTV Agreement, presumably had "full powers" to represent the United States in relation to international agreements, the Agreements are valid "sole executive agreements."[17]

Executive agreements of the same type as the Agreements in question here have been recognized as having the same effect as treaties and international law,[18] and are applied by

---

[16] Department of State, Handbook on Treaties and Other International Agreements, § 721.2(b)(1)-(3) (1955) ("Circular 175 Procedure"); Restatement (Third) of Foreign Relations § 302(2)-(4) (1986) ("Third Reinstatement"). *Cf. Dole v. Carter*, 444 F. Supp. 1065, 1068 (1977) ("*Dole*").

[17] Circular 175 Procedure, § 722.1; Third Restatement, § 311(2); Third Restatement, § 311, cmt. b. Note that an agency may have authority, but it must consult with the Secretary of State before it concludes an agreement. *See* 1 U.S.C. § 112b. *See also United States v. Walczak*, 783 F.2d 852, 855-6 (9th Cir. 1986) (stating that executive agreements may be signed by Ambassadors or lesser authorized governmental officials) ("*Walczak*").

[18] *See Dole*, 444 F. Supp. 1070. In *Dole*, the court viewed an exchange of diplomatic letters between the U.S. and Hungary as forming an executive agreement . *See id.* at 1067.

the courts as the law of the land.[19] Specifically, sole executive agreements are considered to be the supreme law of the land with respect to state law.[20] And when such agreements are not in conflict with any Congressional law, they are considered fully enforceable law, binding on the parties to the agreement, and required to be performed in good faith.[21] Indeed, in the field of foreign relations, the Supreme Court has recognized that in order to maintain our international relations and to avoid embarrassment, Congress must often acquiesce to the actions of the President found in executive agreements.[22]

Accordingly, the U.S.-Mexico TV Agreements should have the same effect as treaties and international law and should be interpreted to be "consistent and harmonious" to the extent possible with the CBPA. While there is nothing in the U.S.-Mexico TV Agreements that precludes the establishment of primary Class A LPTV stations throughout the United States, there is also nothing in the CBPA that indicates that Mexican TV stations should not be protected pursuant to the U.S.-Mexican bilateral agreements. Moreover, the CBPA recognizes the need to provide exceptions to Class A status to protect expected broadcast service.[23] Therefore, the U.S.-Mexico TV Agreements are not in conflict, and the Commission simply needs to ensure that no conflict is created in the adoption of implementing regulations.

---

19 *See Walczak*, 783 F.2d at 856. *See also United States v. Pink*, 315 U.S. 203, 230 (1942).

20 *See* Congressional Research Service, Library of Congress, Prepared for the Senate Comm. On Foreign Relations, 103rd Cong., 1st Sess., Report on Treaties and Other International Agreements: The Role of the United States Senate 53, at 65 (Comm. Print 1993) ("Study"); Third Restatement, § 303, cmt. j.

21 *See* Third Restatement, § 321.

22 *See United States v. Curtis-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (stating that to avoid embarrassment in international relations, "congressional legislation . . . must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved"). *See also Guerra v. Guajardo*, 466 F. Supp. 1046, 1055 (1978).

23 *See* CBPA, 47 U.S.C. § 336(f)(7).

Televisa points out in this regard that one goal of the VHF and UHF Agreements is to maintain maximum efficiency in the use of television channels[24] and, in the case of the DTV Agreement, to facilitate the introduction of DTV service in both countries.[25] The CBPA does not purport to alter these arrangements. The Commission therefore must act consistently with the U.S.-Mexico TV Agreements. However, if the Commission were to violate the U.S.-Mexico TV Agreements by allowing Class A LPTV operations in the U.S. within the power and distance-to-border parameters precluded by the agreements, Mexico could not be expected to comply with the Agreements and to continue to protect U.S. full-service TV stations. This result would be surely contrary to the intent of the CBPA, as well as the existing bilateral Agreements.

Therefore, Televisa submits that it would be in the public interest to disallow primary Class A LPTV operation for any station that is required under the U.S.-Mexico TV Agreements to be operated on a secondary basis or to be coordinated between the two governments. If the Commission were to designate or license any LPTV station close to the border as a Class A station, the Commission, in effect, would be modifying, and indeed repudiating, the U.S.-Mexico TV Agreements. Yet, by their terms, modifications of these agreements can only occur by mutual agreement between the proper U.S. and Mexican officials. Indeed, any changes made to the Agreements become effective only with the exchange of diplomatic notes,[26] and the State Department generally coordinates and controls such negotiations, requiring that anyone engaged in the negotiation, extension, revision, or termination of international agreements on matters of substance receive written authorization from the

---

[24] *See e.g.*, VHF TV Agreement Modification, para J.1.

[25] *See* DTV Agreement, Introduction, third para.

[26] *See* VHF Agreement, para. J, no. 3; VHF Agreement Modifications, para. O.

Department.[27] Thus, the Commission by itself cannot unilaterally change the bilateral agreements in question here.

While the adoption of a new primary class status for LPTV stations may not have been contemplated at the time the United States and Mexico entered into the VHF and UHF Agreements or the DTV Agreement, the adoption of regulations to extend primary status to LPTV stations does not constitute sufficient "changed circumstances" to allow the Commission to abrogate the U.S.-Mexico TV Agreements. On occasion, a treaty or agreement may become inapplicable due to a fundamental change in circumstances, but for this doctrine to apply, new circumstances not foreseen by the parties must arise that radically "transform the extent of obligations still to be performed under the agreement."[28] Because cross-border spectrum allocation and interference issues have remained substantially unchanged as technology has evolved, the establishment of Class A licenses for LPTV stations cannot be viewed as the type of fundamental change that would permit the FCC to disregard the existing bilateral agreements.

B. Under Its Own Rules, The Commission Is Obliged to Protect Mexican TV Stations Under the U.S.-Mexico TV Agreements

In addition to the specific requirements of the U.S.-Mexico TV Agreements discussed above, the Commission's own rules require it to adhere to the U.S.-Mexico Agreements. Commission Rule 73.1650 provides that "[t]he rules in this part 73, and *authorizations for which they provide*, are subject to compliance with the international obligations and undertakings of the United States."[29] The Rule itself specifically covers the bilateral

---

[27] *See* Circular 175 Procedure, § 722.1.

[28] Third Restatement, § 336.

[29] 47 C.F.R. § 73.1650(a) (emphasis added).

agreements between the United States and Mexico concerning television broadcasting.[30] Thus, the Agreements fully bind the Commission.

As the existing Agreements have not been revoked, nor have they been modified to reflect the introduction of Class A LPTV stations, the Commission should set regulations for qualifying LPTV stations for Class A status that specifically mandate protection of Mexican TV stations along the border. That is, the Commission should not grant a primary Class A license to any LPTV stations within the power and distance-to-border parameters identified in the VHF and UHF Agreements (or on channels identified for DTV development in Mexico in the DTV Agreement).

---

[30] *See id.* § 73.1650(b)(4)(iii).

CONCLUSION

For the foregoing reasons, in establishing new regulations for Class A LPTV stations, the Commission must act consistently with the provisions of the U.S.-Mexico TV Agreements and not permit the operation of such stations in violation of the Agreements. The Commission must protect Mexican TV stations as identified in the Agreements in order to comply with international law and the Commission's own rules.

Respectfully Submitted,

GRUPO TELEVISA, S.A.

By: _____

Norman P. Leventhal
Barbara K. Gardner
David S. Keir
Juan F. Madrid

Leventhal, Senter & Lerman P.L.L.C.
2000 K Street, NW
Suite 600
Washington, DC 20006
(202) 429-8970

February 10, 2000

Its Attorneys

CERTIFICATE OF SERVICE

I, Tim Jordan, do hereby certify that copies of the foregoing "Comments of Grupo Televisa, S.A." were delivered this 10th day of February, 2000, to the following in the manner indicated:

VIA HAND DELIVERY

William E. Kennard
Chairman
Federal Communications Commission
445-12th Street, SW
Room 8-B201
Washington, DC 20554

Commissioner Harold Furchtgott-Roth
Federal Communications Commission
445-12th Street, SW
Room 8-A302
Washington, DC 20554

Commissioner Susan Ness
Federal Communications Commission
445-12th Street, SW
Room 8-B115
Washington, DC 20554

Commissioner Michael Powell
Federal Communications Commission
445-12th Street, SW
Room 8-A204
Washington, DC 20554

Commissioner Gloria Tristani
Federal Communications Commission
445-12th Street, SW
Room 8-C302
Washington, DC 20554

Keith Larson
Office of the Bureau Chief
Mass Media Bureau
Federal Communications Commission
445-12th Street, SW
Room 2-C420
Washington, DC 20554

Kim Matthews
Policy and Rules Division
Federal Communications Commission
445-12th Street, SW
Room 2-C225
Washington, DC 20554

Ms. Wanda Hardy
Paralegal Specialist
Federal Communications Commission
445-12th Street, SW
Room 2-C221
Washington, DC 20554

International Transcription Services
445-12th Street, SW
Room CYB400
Washington, DC 20554

T Jordan

Tim Jordan